1051

No. 2899

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED REAL ESTATE AND TRUST COMPANY, a corporation,

Appellant,

vs.

LUCIEN A. BLOCHMAN, UNION TITLE COMPANY OF SAN DIEGO, formerly Union Title & Trust Company, a corporation, UNION TRUST COMPANY OF SAN DIEGO, a corporation, LA BINDA PARK SYNDICATE, a corporation, UNITED STATES NATIONAL BANK, a corporation, R. W. HASKINS, CHARLES R. KIBLER, THOMAS J. HAMPTON, F. M. KINNE, JOHN PALMER KEEP, J. W. DEERING, M. D. GOODBODY and WILLIAM O. SANFORD,

Appellees.

Brief of Appellee, L. A. Blochman

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STATEMENT OF FACTS.

The evidence shows that for some years prior to the 1st day of March, 1893, Charles Kountze, Luther Kountze, Herman Kountze and the heirs at law of Augustus Kountze, a deceased fourth brother, claimed to be owners of that certain tract of land in the City of San Diego, County of San Diego, State of

California, described as the Southwest Quarter of Pueblo Lot 1159, of the Pueblo Lands of San Diego according to the map thereof made by Charles H. Poole in 1856, and on file in the office of the County Recorder of the County of San Diego (Tr., page 306-307), and on that said 1st day of March, 1893, the Kountze family organized a Corporation under the laws of the State of Nebraska called the "United Real Estate & Trust Company", with the following powers as set forth in its Articles of Incorporation (Tr., page 301):

> "To acquire, purchase, hold, own, subdivide, plat, exchange, lease, rent, improve, sell and otherwise dispose of, transfer and convey, real estate of any and every description; to erect and construct buildings and structures of any and every character; to make, build and construct roads, drainage ditches, irrigation ditches, flumes, canals and other similar works of private or internal improvements; to borrow money, and to secure the payment thereof, to mortgage or pledge its real or personal property, or both; in connection with the lands of the corporation, to develop, mine, and market any mineral deposits and valuable substances, buy, sell, raise, feed and deal in live stock, to purchase or acquire stock of companies organized under the laws of this or any other states, or territories of the United States, and to do any and everything and act requisite and necessary or incident to the convenient and advantageous conduct of a general real estate and trust business. *Such business is to be conducted in the said State of Nebraska and in any or all of the*

States, Territories and Districts of the United States whose laws, expressly or impliedly, permit the transaction of the business of said corporation." (Tr., page 302.)

Immediately thereafter said parties conveyed to such Nebraska Corporation by sundry Deeds all their right, title and interest in and to said tract of land in California and the Corporation thereby became vested with whatever right and ownership said parties theretofore had in and to said premises. Since said date the said Corporation, without in any particular attempting to comply with any of the laws of the State of California relative to foreign corporations owning property or transacting business therein, has assumed the exclusive ownership and entire control of said premises, and *has been doing business in* the State of California in connection therewith, exercising most of the powers enumerated in the Articles of Incorporation and on the 15th day of September, 1912, made a contract for the sale of the land to L. A. Blochman, as purchaser under and by virtue of which the title was to be conveyed to and held by the Union Title and Trust Company *under a void Trust to Hold and Convey* to the purchaser when the purchase price was paid. (Tr., folio 143.) Thus creating—not a trust as counsel would have us believe—but *an Executory Contract for the Sale and Purchase of Land, Title Placed in the hands of an Agent of the Complainant to be delivered to Blochman when paid for and not before.*

This contract for the sale of said land to the said Blochman for the sum of $150,000.00 was made by and

through one I. B. Porter (Tr., page 36), then a resident of and doing business in San Diego, California, who was appointed by the Complainant its agent for such purpose, by a telegram bearing date of July 16th, 1912, Mr. Porter collecting the initial deposit of Five Thousand ($5,000.00) Dollars from Mr. Blochman in *San Diego, California,* and remitting same to the Complainant on August 29th, 1912, and for which the Complainant paid I. B. Porter the sum of Four Thousand ($4,000.00) Dollars as a commission, by draft, which was delivered to said Porter by the Complainant's attorney in San Diego, California. The contract was executed by the parties on September 15th, 1912, and Twenty Thousand ($20,000.00) Dollars, the balance of the initial payment, was made by the Defendant, L. A. Blochman, to Complainant's attorney and agent *in San Diego, California,* who remitted it to and it was received by the Complainant.

Subsequently and on April 28th, 1913, L. A. Blochman sold, assigned and transferred all his rights under said contract to the La Binda Park Syndicate, a California Corporation, which is also a Defendant in this action. Default was made in the next payment which was due May 1st, 1913, and after considerable correspondence back and forth, Complainant extended the time of payment and on June 28th, 1913, the La Binda Park Syndicate paid to the Union Title Company of San Diego *at San Diego, California, as Agent and Trustee for Complainant,* upon and under said contract Twenty-five Thousand ($25,000.00) Dollars additional on the Principal, and Thirty-three Hundred Sixteen

and 42/100 ($3316.42) Dollars Interest, making a total of Twenty-eight Thousand Three Hundred Sixteen and 42/100 ($28,316.42) Dollars, which sum, together with One Hundred Forty-seven and 65/100 ($157.65) Dollars, (being Interest on Interest), making a total of Twenty-eight Thousand Four Hundred Sixty-four and 7/100 ($28,464.07) Dollars, was on June 30th, 1913, *by the direction of the Complainants* (Ex. 23, Tr., page 474) remitted by the Union Title Company of San Diego, *to the Bank of California at San Francisco, California, and placed to Complainant's credit,* (Ex. 49, page 501) receipt of which was acknowledged by the Complainant under date of July 21st, 1913, with the request that they collect an additional One Hundred Fifty-six and 25/100 ($156.25) Dollars interest for delay in making payment. (Ex. 54, Tr., page 506.)

On October 16th, 1913, the further sum of Twenty-six Hundred Seventy-one and 75/100 ($2671.75) Dollars interest was paid by the La Binda Park Syndicate to the Union Title Company of San Diego, *at San Diego, California,* and by them remitted by draft to the Complainant, making the total payments made by Blochman and his successor in interest as follows:

August 29th, 1912, preliminary deposit paid to Porter, Five Thousand ($5,000.00) Dollars.

September 15th, 1912, at time of the execution of transaction, Twenty Thousand ($20,000.) Dollars.

June 28th, 1913, on Principal, Twenty-five Thousand ($25,000.00) Dollars.

June 28th, 1913, on Interest, Thirty-four Hundred sixty-four and 7/100 ($3464.07) Dollars.

June 28th, 1913, Interest on Interest, One Hundred Forty-eight and 65/100 ($148.65) Dollars.

October 10th, 1913, on Interest, Twenty-six Hundred Seventy-one and 75/100 ($2671.75) Dollars.

A total of Fifty Thousand ($50,000.00) Dollars on principal and Sixty-two Hundred Eight-four and 47/100 ($6284.47) Dollars interest, all of which was receipted for by the appellants to the Trustee, Union Title Company of San Diego.

The contract before referred to permitted subdivision of the property into not less than Two Hundred Fifty (250) lots (Tr., page 38), and provided that after such subdivision was made, upon the payment to the Trustee *at San Diego, California,* by the purchaser for the benefit of the Complainant, of a sum equal to One Thousand ($1,000.00) Dollars for each and every inside lot, and Twelve Hundred ($1200.00) Dollars for each and every corner lot described in said subdivision or plat, the Trustee was to execute Deeds of any lot or lots to the order of the purchaser or his assigns. (Tr., page 39.)

In accordance with this provision the property was subdivided on the 5th day of March, 1913, into 286 lots, and a map or plat showing such subdivision into an addition called "La Binda Park" (Tr., page 585) was regularly filed in the office of the County Recorder of the County of San Diego, State of California.

When the payment of Twenty-five Thousand ($25,000.00) Dollars Principal, and Thirty-four Hundred Sixty-four and 7/100 ($3464.07) Dollars Interest, was made on June 28th, 1912, the then beneficiary of the "La Binda Park Syndicate", acting under and through

its President, demanded a release and conveyance of Thirty (30) inside lots in the tract, and as a result of such demand the Trustee released from the original trust thirty lots as follows:

Lots B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, and W, in Block Five (5); and

Lots E, F, G, H, I, J, K, and L, in Block One (1); and conveyed to the persons whose money has paid for the release of said lots by *separate and distinct declarations of trust to them* as follows, to-wit:

Lots B, D, F, H, and J, in Block Five (5) to R. W. Haskins, (which lots have since been deeded to him;)

Lots C, E, and G, in block Five (5), to W. R. Rogers, for the order of Louise R. Kibler;

Lots I and J, in Block Five (5), one to order Minnie Fugate, and one to the order of Louise R. Kibler;

Lots L, O, and P, in Block Five (5), to the Blochman Commercial & Savings Bank, to secure a loan made by Louise R. Kibler from said Bank.

Lots Q, R, S, T, U, V, and W, in Block Five (5), to one C. W. Fox or R. A. Steketee, and

Lots C, D, E, F, G, H, I, J, K, and L, in Block One (1) to the United States National Bank, as security for a loan of ten thousand ($10,000.00) Dollars made by the United States National Bank to the La Binda Park Syndicate, which sum was paid to the Union Title Company as part of the Twenty-five Thousand ($25,000.00) Dollars paid to said Company, being the same identical money which was deposited in the Bank of California to the credit of Complainants herein, *and which they still retain without any offer to return it.*

Default having been made in the amount due on November 1st, 1913, the Complainant made a written demand upon L. A. Blochman and the La Binda Park Syndicate to comply with the terms of said contract, and upon their failure so to do, declared the contract forfeited, and has brought this action to recover from L. A. Blochman *the unpaid contract price* and to foreclose the rights of the parties thereunder and has made L. A. Blochman, La Binda Park Syndicate, Union Title Company, Union Trust Company, R. W. Haskins, and the United States National Bank parties defendant to the action.

Subsequently the appellants filed an Amended Bill of Complaint, to which Demurrers were interposed by the appellees, L. A. Blochman, Union Title Company of San Diego, Union Trust Company of San Diego, and La Binda Park Syndicate, which Demurrers were overruled, and subsequently Answers were filed by all of said parties, and also by the United States National Bank and R. W. Haskins. The principal defense relied upon at the trial by these appellees was a plea in abatement upon the ground that the Complainant was a foreign Corporation doing business in the State of California, and had not complied with the laws of the State of California relating to foreign Corporations and particularly Sec. 410, Civil Code of the State of California.

After such submission the Appellants announced that it probably would file its Articles of Incorporation in the office of the Secretary of the State of California to meet the plea in abatement.

Subsequently, to-wit, on April 21st, A. D. 1915, Complainant filed its Articles of Incorporation with the Sec-

retary of State (Tr., page 438), and in May, 1915, the Defendants, L. A. Blochman and La Binda Park Syndicate, filed a new Cross-Bill, setting up as a plea in bar the same facts as previously plead as a plea in abatement.

THE PLEA IN BAR.

As a plea in bar the Appellees plead these facts:

> "That the said Complainant has never filed in the office of the Secretary of State of the State of California any designation of any person residing within the State of California upon whom process issued by authority of or under any law of the State of California may be served. That said Complainant corporation has never filed in the office of the Secretary of State of the State of California, any certified copy or any copy of its Articles of Incorporation or any certified copy or any copy of its charter or of any statute or statutes or of any legislative or executive or governmental acts or act creating it, or any copy of its Articles of Incorporation or charter or of any such statutes or acts or act certified by the Secretary of State or by any other officer of the State of Nebraska, or by any officer authorized by the laws of the State of Nebraska or of the jurisdiction under which complainant is formed to certify to such copy and that there is not on file in the office of the Secretary of State of the State of California, any certified or other copy of Complainant's Articles of Incorporation or charter and that Complainant has never filed in the office of the County Clerk of the County of San Diego, any copy

of its articles of incorporation or charter or any copy of a copy of its articles of incorporation or charter. That Complainant has never complied with any of the terms or provisions of either or any of the following sections of the Civil Code of the State of California, to-wit: Section 405, Section 406, Section 408, Section 410, and Section 299, which said Sections are hereinafter set out." (Tr., page 192.)

At the time the Answer and Plea was filed, *these allegations were admittedly true,* but, as before stated, during the trial and by leave of Court obtained, the Complainant has filed a certified copy of its Articles of Incorporation with the Secretary of State and a copy thereof, certified by the Secretary of State, with the County Clerk, thus partially avoiding the facts thus plead as a Plea in Abatement and in Bar. We say "partially avoiding", because this belated or eleventh hour conversion into a compliance with the laws of California relating to foreign corporations we submit does not entirely wipe out the original transgression and make valid that which was void, or instill life into that which was dead. It is the latter phase of the case we will present in this brief.

For the purposes hereof, we shall subdivide the discussion into three divisions or points, to-wit:

First. That the laws of the State of California prohibit a foreign corporation from "doing business" in this State without a substantial compliance with its laws relating thereto, and such laws provide specific penalties for the violation thereof in the nature of a fine and the deprivation of certain rights, one of which is an express prohibition against such foreign corporation so "doing

business" from acquiring or conveying real property within the State, and that Appellant has been "doing business" therein in violation of such laws and hence cannot maintain this appeal.

Second. That any contract for the sale of land entered into in violation of such laws is void *ab initio* and the mortgage created thereon or equitable lien reserved thereon is void *ab initio*. In other words the entire transaction is *malum prohibitum* and can not be enforced in any Court *nisi prius* or Appellate.

Third. That Appellees are not estopped from raising this question at any time *or in any Court nisi prius* or Appellate.

We will discuss these points in the order named.

POINTS AND AUTHORITIES.

THAT THE LAWS OF THE STATE OF CALIFORNIA PROHIBIT A FOREIGN CORPORATION FROM "DOING BUSINESS" IN THIS STATE WITHOUT A SUBSTANTIAL COMPLIANCE WITH ITS LAWS RELATING THERETO AND SUCH LAWS PROVIDE SPECIFIC PENALTIES FOR THE VIOLATION THEREOF IN THE NATURE OF A FINE AND THE DEPRIVATION OF CERTAIN RIGHTS, ONE OF WHICH IS AN EXPRESS PROHIBITION AGAINST SUCH CORPORATION SO "DOING BUSINESS" ACQUIRING OR CONVEYING REAL PROPERTY WITHIN THE STATE, AND THAT APPELLANT HAS BEEN "DOING BUSINESS' THEREIN IN VIOLATION OF SUCH LAWS.

Section 15, Article XII of the Constitution of the State of California provides:

"Sec. 15: No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State."

Section 1 of the same Article provides:

"Sec. 1: Corporations may be formed under general laws, but shall not be created by special act. *All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section may be altered from time to time or recalled.*"

Section 9 of the same Article further provides:

"Sec. 9. No corporation shall engage in any business other than that expressly authorized in its charter or the law under which it may have been or may hereafter be organized; *nor shall it hold for a longer period than five years any real estate, except such as may be necessary for carrying on its business.*"

Section 408 of the Civil Code provides:

That every foreign Corporation that is

1. Now "doing business" in this State,
2. Which shall hereafter "do business" in this State, or
3. Which shall enter the State for the purpose of "doing business".

Must file a certified copy of its Articles of Incorporation with the Secretary of State and a certified copy thereof in the office of the County Clerk where such corporation owns property.

Section 410 of the Civil Code, as amended in 1911, provides:

That every corporation which *shall fail* to comply with Sections 408-409

1. Shall be subject to a fine.

2. Shall not maintain any suit or action in any Courts of this State.

3. Shall neither acquire *nor convey* any legal title to any real property within the State until it has complied with said Sections,

To come within the prohibition of this statute, a foreign corporation either must have been "doing business" in the State at the time the amendment was passed; or thereafter "done business" in the State; or thereafter entered the State for the purpose of "doing business". It appears that the Appellant owned the property in question herein prior to the adoption of this Amendment, so the prohibition will not apply unless it was "doing business" at the time of its passage, or by subsequent acts in connection therewith, "done business" within the State.

It is not the owning of real property by a foreign corporation which is prohibited, but the acquisition and sale of real property by a foreign corporation which is *"doing business"* in this state which is prohibited, this therefore brings us at once to the question: (a) What constitutes "doing business" in this State by a corporation within the meaning and scope of the Statute, and (b) has the Complainant been "doing such business" within this State?

It may be said as preliminary to this question that the "doing of business" by a foreign corporation within a State may be divided into two general classes.

First, Interstate business, or Commerce; and Second, Intra-State business.

The first is subject to and is controlled by the United States Constitution and Federal Laws, and a State may neither control nor prohibit it. But no question of interstate commerce is involved herein.

The second is within the exclusive control of the State, and may, subject always to constitutional rights, be regulated, controlled, or *even prohibited* by such law.

This second subdivision may again be divided into two classes:

First. Business within the main objects or purposes for which the corporation was organized and for which its capital was to be employed.

Second. Such business as is incidental, auxillary or collateral to the main objects of the corporation.

The right of a foreign corporation to enter a State to do an inter-state business or to acquire, hold or convey real property therein is *based on comity alone.* No foreign corporation has a vested or any right to enter the State of California to "do any business" or to acquire or convey any real property without the consent of the State of California, or without complying with the laws of this State relating thereto. The people of the State have through their legislature said how, what manner, and under what conditions foreign corporations, such as Appellant herein, may "do business" within this

State or may acquire or convey real property, and such corporation must either comply or keep out.

As well said by Mr. Thompson in his work on Corporations at Section 6640; speaking of comity extended by a State to foreign corporations:

> "It is accordingly well settled by the authorities that this comity may be modified or withdrawn and that a State may exclude foreign corporations altogether from 'doing business' within its limits, or it may impose any conditions or restrictions that it may deem fit to impose, provided these conditions do not violate the fundamental law of the State or of the United States. The admission of foreign corporations to 'do business' in another State is absolutely within the discretion of the legislature and is granted solely as a matter of grace or comity, and not of right. 'Every independent community' says Judge Story, 'will and ought to judge for itself how far that comity ought to extend. The reasonable limitation is that it shall not suffer prejudice by its comity.'
>
> "This power of the State is as extensive as its power over domestic corporations and its motives in the enactment of these regulatory statutes cannot be inquired into, however harshly they may operate."

In the leading case of *Paul* vs. *Virginia,* 8 Wall., 168, 181, 19 L. Ed., 357, it was said by Mr. Justice Field, speaking for the whole court in regard to foreign corporations, that:

"Having no absolute right of recognition in other states, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interest."

This language was expressly sanctioned by the same learned court in

Ducat vs. *City of Chicago,* 10 Wall., 410, 19 L. Ed., 972;

Liverpool Ins. Co. vs. *Mass.,* 10 Wall., 566, 19 L. Ed., 1029;

Fire Ass'n vs. *New York,* 119 U. S., 117, 30 L. Ed., 342.

Among the many more recent cases following in the same line are

Ashley vs. *Ryan,* 153 U. S. 436, 38 L. Ed., 773;

Hooper vs. *California,* 155 U. S. 648, 39 L. Ed., 297;

New York State vs. *Roberts,* 171 U. S. 658, 43 L. Ed., 323;

Waters-Pierce Oil Co. vs. *Texas,* 177 U. S. 28, 44 L. Ed., 657.

In this last case it was held that "it is well settled that a state has the power to impose such conditions as it pleases upon foreign corporations seeking to do business within it."

It is not for the Courts to inquire into the reason why, or to question the policy of the statute or the wisdom of such legislation. They must take the statute as they find it and give it effect according to its letter and spirit. If the statute be wrong or the policy bad, the responsibility therefor is upon the people and not on the Courts.

The most important factor in determining whether a corporation is "doing business" is to measure up the acts done against the powers and purposes of the corporation as set out in its Articles or Charter. Are they—if their acts be one or many—within the ordinary business of the corporation, or are they without such ordinary business? If the former, then they are "doing business"; if the latter, they may be or may not be, according to the facts of the particular transaction. Isolated transactions by a corporation in a State other than where it is organized are not as a general rule held to be the doing or carrying on of business, except where the transaction *is one within the very purpose for which the corporation was organized.* When such is the case, one act is as much a "doing of business" as a thousand.

The corporation in question was *organized to acquire, hold,* own, subdivide, plat, sell, and otherwise dispose of *real estate of every description* in the State of Nebraska and in *any* and all *of the States,* territories and districts *of the United States* whose laws expressly or impliedly permit the transaction of the business of said corporation. That is exactly what they have been doing within the State of California ever since the statute in question was passed. Every act done within the State of California was one *within the sole purpose, or object for*

which the Appellant corporation *was organized* and was in the ordinary course of the business for which the corporation was organized—not one of them were incidental or collateral acts. *It has no other business,* according to its Articles or according to the oral testimony adduced at the trial. (Tr., pages 311 and 316.)

It clearly appears that the Appellant executed a deed of the property in question to the Union Title & Trust Company on September 15th, 1912. It further appears that Complainant executed a declaration of trust to the Union Title & Trust Company, *which created an agency in this State for the Subdivision, Sale and Conveyance of the Property in Question and the collection in San Diego, California, of the proceeds of a sale of the Property all for their benefit.* It further appeared that a portion of the money collected for them by their agent in this City was by their direction deposited in the Bank of California *in the City of San Francisco, California,* to their credit.

If these things do not constitute the acquisition, holding, subdivision, platting, selling of real property within the State of California and the use of a portion of its capital in the Real Estate business in this State, then no amount of business by a corporation relating to real estate could or would constitute "doing business" when such corporation was organized for the express purpose of transacting that particular kind of business *in any and all States of the United States.*

This very contract which they are seeking to enforce *creates an agency in this State* for the transaction of a Real Estate business, because the Trustee was their agent

to convey the property and collect the money *at San Diego, California.*

Sec. 2267, C. C.;

Hall vs. *Jamison,* 151 Cal., 606.

A substantial portion of the capital of this Corporation, namely, one hundred and fifty thousand dollars, was employed in this State, and it conducted a substantial part of its business operations, namely, the subdivision and sale of land in the State. These acts are sufficient to bring the Corporation within the rule of "doing business".

People ex rel Southern Cotton Oil Co. vs. *Wemple,* 29 N. E., 1002.

Even a single transaction along the line of the main purpose or object of the Corporation has been held to be the "doing of business".

Denson vs. *Chattanooga etc.,* 107 Fed., 777.

In that case a building and loan association had been organized under the laws of the State of Tennessee. Among its corporate functions was an authorization to loan its funds to its stockholders on real estate security. It had no local office or agent in the State of Alabama, but had a traveling agent whose business it was to solicit subscriptions to this stock and to obtain applications for loans and submit same to the home office of the Association in Tennessee. On the 25th day of April, 1895, the Appellant, Denson, who was a resident of Alabama, at the solicitation of the agent, signed at his home a written application for fifty shares of stock in the Association which was forwarded to the home office in Tennessee where the stock was issued and returned to the agent

to be by him delivered to Mr. Denson. On the same day on which he applied for the stock, Mr. Denson signed a written application for a loan of $2500.00 on the fifty shares of stock that he had applied for. The loan was granted and Mr. Denson executed a note and deed of trust on property in Alabama to the Building and Loan Association which was delivered to the agent of the Building and Loan Association in Alabama, and the agent of the Association delivered to Mr. Denson a check for the amount of the loan.

Subsequently, upon the non-payment of the note, an action was brought to foreclose the Deed of Trust in the Circuit Court, and a defense was made by Mr. Denson thereto on the ground that the contract sought to be enforced was illegal on account of the failure of the Building and Loan Association to comply with the laws of Alabama prescribing the conditions under which foreign corporations might "do business" in that State.

Judgment went against Denson in the Circuit Court and he appealed to the Circuit Court of Appeals which very thoroughly reviewed the law relating to the subject and reversed the case with instructions to dismiss the Complaint. In the decision, Judge Pardee quotes with approval the following language from the case of *Farrior* vs. *Security Co.*, 88 Ala., 275, viz:

> " 'The loan of the money by Complainant to the defendant was an act of corporate business, which was prohibited by the constitution; and this illegal act was the consideration of the defendant's promise to pay the borrowed money. The promise, therefore, was void, and, being executory, the courts will

not lend their aid to its enforcement; for this would be a subversion of a regulation made for the public good. Apparent injustice, it is true, often follows from the application of provisions of this nature, by which contracts are annulled for illegality, or as obnoxious to good morals, or violative of public policy, or for repugnancy to positive statutes. But the law does not allow this result for the benefit of either of the offending parties as being less censurable or more favored than the other. It only lets the parties who are in equal fault severely alone, as the surest mode of securing obedience to the authority of mandates.' "

And Judge Pardee then says:

"Following the proper rule, as declared in the last-cited case,—*i. e.,* to 'let the parties who are in equal fault severely alone,'—the decree of the circuit court is reversed, and the cause is remanded, with instructions to dismiss the bill."

The case was appealed to the Supreme Court of the United States and *was affirmed.*

Chattanooga N. B. and L. Assn. vs. *Denson,* 189 U. S., 407, 47 Law. Ed., 870.

Wherein that Court says (we quote from the syllabus):

"The granting of a loan by a Tennessee building and loan association to a citizen of Alabama upon the latter's signed application, solicited by a traveling agent for the association, and the taking as security of a note and mortgage executed within the state by the borrower, constitute, regardless of the

form and terms of such instruments, *the doing of business* in the state, within the meaning of Ala. Const., art. 14, and Ala. Code, 1896, §§ 1316, 1318, 1319, requiring foreign corporations doing any business within the state to designate a local agent for service of process, and to have a known place of business within the state."

This was but a single isolated transaction and yet because the act was within one of the principal purposes of the corporation it was held to be doing business.

A comparison of the statutes of California before quoted and the statutes of Alabama quoted in the decisions will show the provisions are almost identical.

To the same effect are:

Cyclone Mining Co. vs. *Baker L. & P. Co.,* 165 Fed., 996;

Nat'l Building Assn. vs. *Brahan,* 80 Miss., 418, 31 So., 840;

In re Comstock, 3 Saw. 318, Fed. Cases 3077;

Penn Life Insurance Company vs. *Bauerle,* 33 N. E., 166;

Farmers Loan & Trust Co. vs. *Lake St. R. R.,* 51 N. E., 55;

Tomson vs. *Men's Association,* 129 N. W., 529;

Text Book Company vs. *Lynch,* 69 Atl., 541;

Loomis vs. *Construction Company,* 211 Fed., 453;

Glass Company vs. *Smythe Co.,* 128 S. W., 1136;

Brooks vs. *Nevada Nickel Syndicate,* 53 Pac., 597;

People's Building & Loan Ass'n vs. *Markley,* 60 N. E., 1013;

John Deer Plow Co. vs. *Wyland,* 76 Pac., 863.

In addition to the prohibitions heretofore spoken of, Section 360 of the Civil Code provides:

> "Sec. 360: No corporation shall acquire any more real property than may be reasonably necessary for the transaction of its business or the construction of its works, except as otherwise specially provided."

The natural meaning and inference of this section, certainly is that unless a corporation is transacting business in this State, it cannot acquire real property therein, because it is prohibited by this section from acquiring any more real property than is reasonably necessary for the transaction of its business; hence, if Appellant was not "doing business" it could not own or hold the land involved herein, and the very owning and holding of land of necessity implies that it is "doing business".

See also Sec. 9, Art. XII, Constitution, *supra.*

Counsel will argue that as the Appellant acquired the property in question prior to the Amendment of Sec. 410, C. C., that it has a constitutional right to continue to do business in the State despite the prohibition; in other words that it has *a vested right in comity.* This is a fallacy. It is within the reserved power of the State to *amend any law of the State relating to corporations.*

Constitution, Art. XII, Sec. 1.

Foreign corporations can have no greater rights to own property or to do business than have domestic corporations.

Constitution, Art. XII, Sec. 15.

The laws of real property of a state, how it may be acquired, held or conveyed, are peculiarly within the

jurisdiction of the State and the legislative authority thereof.

Nathan vs. *Lee,* 52 N. E., 987 (Ind.);

Colby vs. *Cleaver,* 169 Fed., 206.

The right of Appellant to at any time have acquired real property in this State is based on comity alone.

Paul vs. *Virginia, supra;*

This comity may at any time be withdrawn or modified.

Manchester, etc. vs. *Herriott,* 91 Fed., 711-718.

Wherein Judge Shiras said:

> "The power and right of a State to exclude foreign corporations not engaged in interstate commerce, or in the furtherance of the business of the United States, from entering the State, *includes the right to preclude such foreign corporations from continuing in business and also includes the right to impose conditions upon such continuances.*"

Connecticut, etc. vs. *Spratley,* 172 U. S., 602.

Wherein Mr. Justice Peckham says:

> "Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders the State is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the State *but it may alter at its pleasure.*"

To the same effect is *Doyle* vs. *Insurance Co.,* 94 U. S., 535, wherein Mr. Justice Hunt, speaking for that Court says:

"A license to a foreign corporation to enter a State does not involve a permanent right to remain. Subject to the laws and Constitution of the United States, full power and control over its territories, its citzens and its business belong to the State."

A mere license by a State is always revocable.

Rector vs. *Philadelphia,* 24 How., 300.

See also on the same point:

Mutual Life Ins. Co. vs. *Mullan,* 107 Md., 457, 69 Atl., 385;

State vs. *Hammond Packing Co.,* 110 La., 180, 34 So., 368.

There is no such thing as a vested right to Law.

Munn vs. *Illinois,* 94 U. S., 113.

The comity was withdrawn by Sec. 410 C. C., as amended in 1911, unless compliance was had with the requirements of said Section within ninety days from and after the date said Amendment took effect, which was sixty days from and after its passage.

Statutes 1911, Page 1113.

This gave Appellants herein one hundred fifty (150) days or five months after the passage of the act to either comply therewith or get out. They elected to stay in and continued to do business in the State. They, therefore, must now submit to the law.

When Appellant entered this State it did so with notice that the State reserved the right to change, amend or modify its corporation laws both domestic and foreign as it saw fit, because Complainant is deemed to have entered this State with notice of and under an implied agreement to become subject to the laws of this State.

Zacher vs. *Fidelity Trust etc.,* 109 Ky., 441, 59 S. W., 493;

State vs. *Standard Oil Co.,* 194 Mo., 124, 91 S. W., 1062;

Glens Falls & C. vs. *Travelers' Ins. Co.,* 42 N. Y. S., 285;

State vs. *Virginia-Carolina Chemical Co.,* 71 S. Car. 544, 51 S. E., 455;

State vs. *Cumberland Tel. &c. Co.,* 114 Tenn., 194, 86 S. W., 390;

Waters-Pierce Oil Co. vs. *State,* 19 Tex. Civ. App., 1, 44 S. W., 936;

Hiskey vs. *Pacific States Sav. &c. Co., 27* Utah, 409, 76 Pac., 20;

Floyd vs. *Nat'l Loan &c. Co.,* 49 W. Va., 327, 38 S. E., 653.

The evidence before this Court does not disclose the slightest effort or intent on the part of Complainant to comply with the law. It was not until the end of a long trial that they evinced the slightest regard for the law of this State, and then only when beset by the fear that they had carried their defiance to the breaking point did they yield to a plain, clear, just and equitable mandate of the legislative authority of the State which would place them on a plane of equality with domestic Corporations. This law is not harsh, it is not oppressive, it is not unequitable. It has behind it a salutory purpose, viz., to enable those who do business *here* with it to sue in the Courts of this State and thereby avoid the delay and expense which often would be tantamount to a denial of Justice, of following it into the Courts of the foreign

jurisdiction where it was created, and also of compelling it to contribute its mite to the support of the Government of the State in which it owns property and the protection of whose laws it asks. The only support of the State Government are the taxes paid by corporations, and Complainant by refusing to file its articles has thus avoided the payment of any State taxes. It thus defies the law of the State of its adoption for its own pecuniary benefit and yet now seeks the aid of that law for its protection.

> "Upon what meat does this our Ceasar feed that he is grown so great."

II.

THAT ANY CONTRACT FOR THE SALE OF LAND ENTERED INTO IN VIOLATION OF SUCH LAWS IS VOID AB INITIO AND MORTGAGE CREATED THEREON OR EQUITABLE LIEN RESERVED THEREON IS VOID AB INITIO. IN OTHER WORDS, THE ENTIRE TRANSACTION IS MALUM PROHIBITUM AND CAN NOT BE ENFORCED IN ANY COURT, NISI PRIUS OR APPELLATE.

We have shown under the preceding heading that the Appellant has been doing business in this State in violation of its laws, and it now remains to consider its right to enforce a contract made by it under such conditions. The transaction upon which it seeks to recover was and is unlawful, unlawful because entered into in violation of law and by reason of its illegality no recovery can be had thereon, for as said by Judge Duncan in *Swan* vs. *Scott,* 11 Serg. & R., 155, 164,

> "The test whether a demand connected with an illegal transaction is capable of being enforced at

law is whether *the Plaintiff* requires the aid of the *illegal transaction* to establish his case. If the Plaintiff cannot open his case without showing that he has broken the law, the Court will not assist him, whatever his claim in justice may be upon the Defendant."

Also as was well said by the Supreme Court of the United States in

Bank etc. vs. *Owen,* 2 Pet., 527.

"No Court of Justice can in its nature be the handmaid of iniquity. Courts are instituted to carry *into effect the laws* of the country. *How can they become auxillary to the consumation of violations of law?* There can be no civil right where there is no legal remedy and there can be no legal remedy *for that which* in *itself is illegal.*"

Appellant herein relies upon the contract with Blochman to recover, without it has no case. Therefore if the contract is illegal, Appellant cannot ask or expect this Court to become its "auxillary to the consummation of (its) violation of law".

The statutes of this State referred to herein are both prohibitory and mandatory.

Every Corporation, etc. *must file* etc.

Sec. 408, C. C.

Every Corporation, etc. *must* at the time of filing, etc.

Sec. 405, C. C.

No foreign Corporation *which shall fail* to comply, etc.—Can * * * * * convey any legal title to any real property within this State.

Sec. 410, C. C.

No Corporation * * * * * *must* hold property in any County in this State without filing a copy, etc.

Sec. 299, C. C.

That is not lawful which is contrary to an *express provision of law* or contrary to the *policy of express law* though not expressly prohibited by it.

Sec. 1667, C. C.

The consideration of a contract must be lawful withing the meaning of Sec. 1667, Civil Code.

Sec. 1607, C. C.

In construing a similar statute of the State of Oregon, Judge Deady in *In re Comstock,* 3 Saw. 218, 6 Federal Cases, No. 3078, said:

> "But it is said that this staute is directory, and therefore the acts of the foreign corporation done in disregard of it are not illegal and void. It is the duty of a court to give effect to the intention of the legislature as far as practicable, and such intention should be ascertained from the words used in the Statute and the subject matter to which it relates. The words of this act are certainly mandatory in form. Before transacting any business the corporation must appoint an attorney. Language could not make it plainer. The purpose of the act is apparent. As has been said, it is to secure the people of the state the right to sue the foreign corporation in the courts of the state; but unless the attorney is appointed before the business is transacted it will not be attained. In *Rex* vs. *Loxdale,* I Burrows, 447, Lord Mansfield laid down the rule that whether a statute is mandatory or not, *depends upon wheth-*

er the thing directed to be done is the essence of the thing required. Now the appointment of an attorney is the very essence of the thing required in this case. In fact, nothing else is required, and without this the statute would be utterly inoperative.

"This act, being mandatory, is therefore a prohibition against the transaction of business by the bank in this state without first complying with its terms, and as a necessary consequence all acts done in violation of it are illegal and void. *The legal effect of the act is the same as if it read: it shall be unlawful for any foreign corporation to transact business in this State before appointing an attorney,* etc."

So with the statute under question, the very essence thereof is the requirement that foreign corporations file their articles before they can do business in this State, nothing else is required, hence, if a corporation may or may not at its pleasure comply therewith the law is a sham and a delusion.

The statute in question provides a penalty, viz., a fine of not less than $500.00.

The rule is that where a statute pronounces a penalty for an act, a contract *founded upon such act* is void although the statute does not pronounce it void, nor expressly prohibit it.

Swanger vs. *Maberry,* 59 Cal., 91;
Santa Clara vs. *Hayes,* 76 Cal., 387;
Gardner vs. *Talum,* 81 Cal., 370;
Morrill vs. *Nightingale,* 93 Cal., 452;
Wyman vs. *Moore,* 103 Cal., 214;

Visalia vs. *Sims,* 104 Cal., 326;
Berka vs. *Woodward,* 125 Cal., 119;
Howell vs. *City of Hamburg,* 165 Cal., 172.

In *Swanger* vs. *Maberry, supra,* which was an action to recover upon two promissory notes given for the privilege of cutting timber growing upon public lands which the payee of the notes did not own, McKee, Judge, said:

> "And being an act forbidden by law a contract founded upon it is invalid and cannot be made the subject of an action.
>
> "The general principle is well established that a contract founded on an illegal consideration, *or which is made for the purpose of furthering any matter or thing prohibited by statute,* or to aid or assist any party therein, is void. This rule applied to every contract which is founded on a transaction *malum in se,* or which is prohibited by statute, on the ground of policy."

In *Santa Clara* vs. *Hayes, supra,* which was an action to recover on a contract made to restrain trade, Searls, C. J., said (page 390):

> "Was the contract with defendant in contravention of public policy? The general rule is, that an illegal contract is absolutely void, and cannot form the basis of judicial proceedings. This is equally so in law and equity. The illegality vitiates the contract between the immediate parties, as well as in respect to third parties. A contract tainted with the vice of illegality *creates no obligation, not because of the rights of the parties to it, but because the pub-*

> *lic is interested.* In case of fraud or mistake, the wrong is usually personal to the injured party, and may be waived. In cases of illegality, the wrong is far-reaching, —is done to society."

and further, at page 392:

> "The Courts cannot be successfully invoked and their execution will be left to the volition of the parties thereto."

In *Gardner* vs. *Talum, supra*, an action by a physician to recover for services rendered a patient *before he had procured a certificate* required by law before he could practice under laws of California, Mr. Justice Patterson said (page 373):

> "The general proposition is well established, that a contract founded on an illegal consideration, *or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein is void.* This rule applies *to every contract* which is founded on a transaction *malum in se, or which is prohibited by Statute,* or to aid or assist any party therein, *is void.* This rule applies to every contract which is founded on a transaction *malum in se,* or which is prohibited by statute, on the ground of public policy. (*Swanger* vs. *Mayberry*, 59 Cal., 91; *Ladda* vs. *Hawley*, 57 Cal., 51.) This principle is in accord with the express provision of our Civil Code, which makes that unlawful which is either contrary to the express provision of law, or "contrary to the policy of express law, though not expressly prohibited." (Civ. Code, sec. 1667.)

In *Morrill* vs. *Nightingale, supra,* an action to recover upon four promissory notes and to foreclose a contract for the purchase of some stock, it being shown that the notes were obtained as a settlement of a felony although that fact was not set up as a defense, the Court speaking through Garoutte, Justice, said:

> "As the answer of defendants does not rely upon such defense, we will not pursue the subject further, although Chief Justice Ryan undoubtedly declared the true rule in *Wight* vs. *Rindskopf,* 43 Wis., 348, wherein he said: 'If the objection be not made by the party charged, it is the duty of the Court to make it on its own behalf. Courts owe it to public justice and to their own integrity to refuse to become parties to contracts essentially violating morality or public policy by entertaining actions upon them. *It is judicial duty always to turn a suitor upon such a* contract *out of Court, whenever and however the character of the contract is made to appear.*' "

In *Wyman* vs. *Moore, supra,* which was an action, to recover money given to a broker to buy wheat on margins, the Court, by Mr. Justice McFarland, said:

> "We think that the judgment and order should be affirmed. Waiving the question of the alleged illegality of the transactions about wheat—upon which illegality appellant rests her claim to a recovery—it appears that the appellant was not an innocent party to such transactions, but took part in and ratified them. Being therefore a party in *pari delicto,* the law leaves her where it finds her."

In *Visalia, etc.* vs. *Sims, supra,* The Visalia Gas & Electric Light Company leased its plant to one Lynch, who agreed to pay a stipulated rent therefor; Lynch took possession of the plant, operated same, gave a bond for the rent, but failed to pay the same, and an action was brought against the sureties upon the bond to recover the rent. The Court held the lease *ultra vires* as against public policy and denied a recovery upon the bond for the rent because the consideration was illegal, and Mr. Commissioner Temple speaking for the Court said (page 332):

> "It is said, however, that when a contract which was *ultra vires* has been performed on one part, the other is then estopped to plead that the contract was *ultra vires*. Here, however, the contract was void, because against public policy. *In such cases courts will not give relief to either party.*"

In *Berka* vs. *Woodward, supra,* which was an action to recover for some lumber and material sold to and used by the City of Santa Rosa while Berka, the Plaintiff, was a member of the City Council in contravention of a provision of the City Charter of Santa Rosa. Mr. Justice Henshaw, in rendering the decision of the Court, covers the entire question presented herein and says:

> "This, then, is the undoubted rule, that when a contract is expressly prohibited by law, *no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent, for to permit this would be for the law to aid in its own undoing.*"

In *Howell* vs. *City of Hamburg, supra,* which is the

latest expression of the Supreme Court upon this question, the action was brought to recover rent due under a lease of a building which was to be and was built of frame and corrugated iron in violation of the ordinance of the City of San Francisco establishing fire limits and prohibiting the erection of that kind of building within such limits. The defense was the illegality of the lease for the reason that the building was built in violation of and contrary to law; and the court, speaking through Mr. Justice Angelloti said:

> **"the construction of this building on this lot, which was expressly provided for in the lease, was 'contrary to an express provision of law', and therefore 'not lawful' (Civ. Code, sec. 1667) on May 17, 1906, and at all times thenceforth. We regard this proposition as so elementary in its nature as to require no citation of authority to uphold it. Certainly no case cited by learned counsel for plaintiff tends to support a contrary law.
>
> "It necessarily follows that the contract of lease was founded upon an unlawful consideration, *and that the entire contract was therefore void and unenforceable.* (Civ. Code, secs. 1607, 1608; *Berka* vs. *Woodward,* 125 Cal., 119, (73 Am. St. Rep. 31, 45, L. R. A., 420, 57 Pac., 777); *Swanger* vs. *Mayberry,* 59 Cal., 91.)
>
> "It is claimed that even if the original lease was void and unenforceable for the reasons stated, plaintiff is not required to rely upon the same for a recovery in this case, reliance being placed upon the rule that the test whether a demand connected with

an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case. *Admittedly if he does so require the aid of the unlawful transaction, he cannot enforce his claim.*"

This is a parallel case to the one at bar, in that the contract was made contrary to an express provision of law and therefore was not lawful, but had been partially performed, yet the courts refused to enforce it.

These California cases are controlling on the Federal Courts on questions arising in California, but this state is not alone in that interpretation of the law. The Alabama Courts in construing a similar law in that state where a loan of money had been made to a resident of Alabama by a foreign corporation who had failed to designate an agent as required by the Constitution of that State and who had brought an action to recover the money and to foreclose the security given therefor, upheld the same principle. The Supreme Court, speaking by Mr. Justice Somerville said (we have quoted this before, but it well bears repeating):

"The loan of the money by Complainant to the defendant was an act of corporate business, which was prohibited by the constitution; *and this illegal act was the consideration of the defendant's promise to pay* the borrowed money. *The promise* therefore, was void, *and, being executory, the Courts will not lend their aid to its enforcement;* for this would be a subversion of a regulation made for the public good. Apparent injustice, it is true, often follows from the application of provisions of this

> nature, by which contracts are annulled for illegality, or as obnoxious to good morals, or violative of public policy, or for repugnancy to positive statutes. But the law does not allow this result for the benefit of either of the offending parties as being less censurable or more favored than the other. It only lets the parties who are in equal fault severely alone as the surest mode of securing obedience to the authority of its mandates." *Farrior* vs. *Security Co.*, 88 Ala., 275, 278, 279, 7 So., 200.

The same rule is laid down in Oregon, where a Canadian Bank had loaned money to a resident of Oregon without appointing an agent as required by the laws of that State and who sought through the Bankruptcy Court to prosecute a recovery therefor. Judge Deady in discussing the matter said:

> "This foreign corporation having no power to do business in this State, except by the consent of the State, and consent having been given upon a condition precedent, which was never performed the *power to make the contract* was never in the Corporation",

and he held that no recoverey could be had thereon.

In re Comstock, 3 Saw. 218.

In *Diamond Glue Company* vs. *United States Glue Company,* 103 Fed., 838, where the Court had under consideration the effect of a Wisconsin statute similar to the California statute upon an executory contract made prior to the enactment of the statute, but to be performed subsequently thereto, Judge Seaman, speaking for the Court said:

"That an enactment within the power of the State which prohibits the transaction of business therein by foreign corporation, *except upon compliance with certain conditions, invalidates any contract* entered into in violation of the statutes so that the contract cannot be enforced in any court administering the law in such State. (Citing cases.)

"Where the prohibition is plain this rule governs equally with or without express terms in the Statute declaring the invalidity of the contract."

This ruling was subsequently affirmed by the Supreme Court of the United States in *Diamond Glue Company* vs. *United States Glue Company,* 187 U. S., 611.

To the same effect is the decision of the Circuit Court of Appeals of the Third Circuit in *Pittsburgh etc.* vs. *West Side etc.,* 154 Fed., 939, where a similar Pennsylvania statute was under consideration and Judge Holland, speaking for that Court, said:

"Do these provisions of this act of 1874 then render void all contract made by foreign corporations without having first registered as required? The weight of authority is to the effect that it is not absolutely necessary in order to make such contracts void that the Legislature should in express terms, declare them so. The rule in this regard has been clearly and aptly expressed by Lord Chief Justice Holt in *Bartlett* vs. *Minor,* Carthew 253, as follows:

"Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so, but only inflicts

a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute'."

The Court further said:

"The suit here is against the sureties of the contractor, and the illegal contract the basis of the action. As the Plaintiff must rely upon its void contract to recover, the action must fail. The test as to whether the action is grounded upon the void contract depends upon whether it requires the aid of an illegal transaction to establish the case, and, if it be necessary to prove the illegal transaction in order to maintain the action, the courts will not enforce it, nor will they enforce any alleged rights springing from such agreements."

A few of the many other authorities upon the subject are:

"In *Williams* vs. *Cheney,* 3 Gray, 222, it was held that a promissory note given for the premium of insurance to a foreign insurance company which had not complied with the statutes of Massachusetts upon that subject was void in the hands of the company. In *Jones* vs. *Smith,* Id. 501, in a like case, it was said by the court, Metcalf, J.: 'It was essential to the validity of the contract of insurance, which was the consideration of this note, that the insurance company should previously have complied with the provisions of the statutes of the commonwealth.' This ruling was followed in *Roche* vs. *Ladd,* 1 Allen, 441, in which, according to the syllabus of the case, the court, Hoar, J., held that 'a note given for the

premium upon a policy of insurance issued in violation of Stat. 1856, c. 252, concerning insurance companies, is invalid. In *National Ins. Co.* vs. *Pursell,* 10 Allen, 232, it was held by the court, Hoar, J., that a contract of insurance with a foreign company in violation of the following enactment: 'Every foreign insurance company before doing business in this state shall, in writing, appoint a citizen thereof, resident therein, a general agent, upon whom all lawful processes against the company may be served,' was void. This statute is substantially the same as the Oregon act."

"In *Rising Sun Ins. Co.* vs. *Slaughter,* 20 Ind. 520, it was held that a contract of insurance made with a foreign insurance company, contrary to the statute of Indiana, was void."

"In *Aetna Ins. Co.* vs. *Harvey,* 11 Wis., 395, it was held that no action could be maintained by a foreign insurance company upon a note given for a premium of insurance, where the company had neglected to comply with the statute of Wisconsin, which provided that it should not be lawful for any such company to transact business in the state without first having filed a statement of its affairs and condition with the secretary of state. In the course of the opinion the court (page 396) say: 'The sole question therefore presented in the case is as to the effect of such non-compliance upon the contract, and the note sued on. It was claimed for the plaintiff in error, that inasmuch as the statute does not say that any policy issued or note taken in violation of

its provisions should be void, that therefore they should not be so held. And that the only effect of the law would be to render the agent liable to prosecution for violating it or to an action for damages. But we do not see how this position can be sustained in view of the well-established rule of law that a contract made in violation of a statute is void, and that courts will never lend aid to its enforcement'."

"In *Cincinnati Mut. Health Assur. Co.* vs. *Rosenthal,* 55 Ill., 90, it was held that a contract of insurance with a foreign company made in violation of the law of Illinois was void. The statute in that case provided that it should not be lawful for foreign insurance companies to do business in that state, without first procuring a certificate of authority from the auditor of the state. In the course of the opinion, the court (page 91), say: 'When the legislature prohibits an act or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise, would be to give the person or corporation, or individual, the same rights in enforcing prohibited contracts, as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so,

places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee, we entertain no doubt.'

"In this case, on behalf of the insurance company, it was contended that as the act imposed a penalty upon the agent for doing business contrary to it, it thereby appeared that the legislature did not intend to make the contract void. After disposing of this objection, the court (page 92) say: 'Had no penalty been provided, no one would have, for a moment, hesitated to say that the note was, under this law, utterly void.' In the Oregon act there is no penalty, nothing but the unqualified command or prohibition, which has universally been held to render invalid all acts done contrary to it."

"In *Bank of U. S.* vs. *Owens,* 2 Pet. (27 U. S.), 538, the court held that a contract contrary to a clause in the act incorporating the bank, which forbid it to take a greater interest than six per cent., but did not declare such contract void, was nevertheless illegal and void. In answer to the question, 'whether such contracts are void in law, upon general principles', the court say: 'The answer would seem to be plain and obvious, that no court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxillary to the consummations of violation of law?' "

"In *Wheeler* vs. *Russell,* 17 Mass., 280, it was held that a promissory note given in payment for

shingles sold contrary to a statute requiring them to be surveyed before offered for sale was void. In delivering the opinion of the court, the chief justice said: 'No principle of law is better settled than that no action will lie upon a contract made in violation of a statute or of a principle of the common law.' "

"In *Belding* vs. *Pitkin,* 2 Caines, 149, Thompson, J., said, 'It is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful'. In *Shiffner* vs. *Gordon,* 12 East, 304, Lord Ellenborough laid it down as a settled rule, 'that when a contract which is illegal, remains to be executed, the court will not assist either party, in an action to recover for the non-execution of it.' "

"In *White* vs. *Franklin Bank,* 22 Pick, 181, it was held, that when upon the making of a deposit in a bank the depositor received a certificate in which it was stated that the money was to remain on deposit for a certain time, and a statute provided that no bank should make or issue any certificate or contract for the payment of money at a future day certain, such certificate was issued in violation of such statute and as against the bank illegal and void."

"In *Russell* vs. *De Grand,* 15 Mass., 37, it was held that a promissory note given for the premium on a policy of insurance on a vessel bound on a voyage prohibited by the laws of the United States, was void."

"In *Springfield Bank* vs. *Merrick,* 14 Mass., 334, it was held that when a statute prohibited banking corporations of that state from receiving or negotia-

ting the bills of banks not so incorporated, a promissory note payable in such bills to a banking corporation of Massachusetts was void and no action could be maintained upon it by the payee."

III.

THAT THE APPELLEES ARE NOT ESTOPPED FROM RAISING THIS QUESTION BEFORE THIS COURT AT THIS TIME.

Having under the two preceding subdivisions shown that the Appellant has been "doing business" in California in violation of the laws thereof, and that the contract sought herein to be enforced is for that reason void, it now remains to be considered whether or not the Appellee, Blochman, being in *pari delicto* with the Appellant, can avail himself of the wrong as a defense to this action or on this appeal by Appellants, and also its effect upon the other defendants who have succeeded to Blochman's interest in the *corpus* of the suit.

The Appellees are not estopped from raising the question, because if they were, Appellant would thus be permitted to take advantage *of its own wilful defiance of the law. Profit by its own wrong!* What we believe to be the correct rule, and the one which is supported by the great weight of authority is ably set forth in *Cyclone Mining Company* vs. *Baker, L & P. Co.,* 165 Fed., 1001, by Judge Wolverton in passing upon an Oregon statute forbidding foreign corporations doing business in that State without having appointed an agent therein upon whom process may be served. He said:

"Nor are the defendants estopped, by reason of their contractual relations with the plaintiff, from insisting that the contract is void, and the plaintiff without legal right or capacity to sue for the breach thereof, because, if so estopped, tthe plaintiff would be permitted to take advantage of its own offending acts done in derogation and even in defiance of the law. It would be a revolting doctrine, fraught with inconceivable deleterious results, if a foreign corporation could come into a state not its own, and there carry on a business in direct defiance of the provisions of law by which it may capacitate itself for the transaction of business therein, and then validate its acts because, forsooth, parties had dealt with it; for but few others have cause for suit except those having contractual relations in some form with such corporations. True, the state might enterpose to prevent the further doing of business within its borders, but that is beside the question that an offending thing shall be clothed with ample authority to enforce its contracts anywhere simply because others have contracted with it. Suppose the state by statute, had utterly inhibited foreign corporations from doing business therein, as it has a perfect right to do, what standing could such corporations acquire by doing business therein nevertheless? What comity would remain for doing such business, and what comity for suing in the courts of the states to enforce their contracts? None whatever. The comity being gone, the right in either aspect is entirely abrogated, and none exists. Can it

be that the right may, nevertheless, exist by estoppel? Such a proposition is utterly without persuasive force. In what better situation is a foreign corporation that enters another state without the observance of conditions precedent to its doing business therein? None that I can see. That the estoppel does not exist is sustained by *In re Comstock, supra,* and the Oregon cases. See, also, 19 Cyc. 1289-1291. While there are cases to the contrary, I am constrained to follow these."

To the same effect is the decision of Judge Deady in *In re Comstock,* 3 Saw., 218, wherein he says:

"This foreign corporation having no power to do business in this state, except by the consent of the state, and consent having been given upon a condition precedent, which was never performed, the power to make this contract was never in the corporation. So far as it was concerned the act was *ultra vires.*

"The doctrine of estoppel in *pais* has never been carried so far as to prevent a party from showing that a corporation, even if it be one *de jure,* had not the power to do a particular thing, or that it was done in violation of a statute. When, in a given case, it appears there is a corporation *de facto* acting under a law which gives power to do the act in question, the party dealing with such a corporation so as to recognize its existence, is therefore estopped from alleging any irregularities in its organization with a view of showing that such act is illegal. But where the objection *is a want of power*

in the corporation, and not a defect in its organization, the case is different. For instance, a corporation formed under the Laws of Oregon for the purpose of navigating the Willamette river would have no power to engage in the manufacture of shoes, and if it did so its acts would be illegal. No one would be estopped to allege the fact whenever it became material. To do so would only be to deny its existence as a corporation to manufacture shoes, and as to this it would be neither a corporation *de facto* nor *de jure.* Again, if such a corporation was forbidden by statute to carry Indians on its boats, it could not make or enforce a contract for that purpose, and no one would be estopped from alleging the fact in bar of an action by the corporation for the passage money."

"In *Russell* vs. *De Grand, supra,* the voyage upon which the vessel was insured being an illegal one, the defendant, though a party to the agreement, was permitted to show its illegality to defeat a recovery upon it. So in the cases above cited, arising under the laws of Massachusetts, Indiana, Illinois and Wisconsin, concerning foreign insurance companies doing business in those states, the defendants, although parties to the transactions, were allowed to show that they were contrary to law and void. The reason of the rule is apparent and satisfactory. The maintenance of the public policy of a state, as manifested by its legislation, is of much more importance than the real or purposed equities of the parties to an illegal transaction, and therefore

they are not estopped to show such illegality for the purpose of preventing the enforcement of a contract in opposition to such policy. Otherwise the public law and policy would be at the mercy of individual interest and caprice.

"In 2 Pars. Cont. (5th Ed.), 799, it is said: 'It must be obvious, however, that the doctrine of estoppel can go no further than to preclude a party from denying that he had done that which he has power to do;' and with like reason the converse of this proposition must be true—a party is not thereby precluded from denying that another has made a contract which he had no power to make or was prohibited from making, although he may have been a party to such illegal contract. In note to the text of Pars. on Cont., *supra,* it is said: 'A corporation may show its incapacity for a certain contract or course of action.' 'There cannot be an estoppel to show a violation of a statute, even to the prejudice of an innocent party.' *Steadman* vs. *Duhamel,* 1 C. B., 888. 'Legal incapacity cannot be removed by fraudulent representation, nor can there be an estoppel involved in the act to which the incapacity relates, that can take away that incapacity.' *Keen* vs. *Coleman,* 39 Pa. St., 299.

"In *Lowell* vs. *Daniels,* 2 Gray, 161, it was held that a married woman was not estopped to show that her deed, which upon its face appeared to have been made when she was femme sole was in fact made when she was covert and therefore void. In the course of the opinion, Thomas J. (page 169), says:

'This doctrine of estoppel in pais would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates.' To the same effect, in the case of an infant, is *Brown* vs. *McCune,* 5 Sandf., 224. In the same way, to allow this corporation, by means of an alleged estoppel, which grows out of the very act prohibited, to indirectly do an act for which it had neither capacity nor right, would be practically to dispense with the limitation which the state has imposed upon its power of doing business therein."

Likewise a similar law in Colorado was construed by Judge Hallett in *United States Rubber Co.* vs. *Butler Bros.,* 132 Fed., 398. He said:

"Not having complied with the act of assembly of 1901, it must be said that they have no right of action upon the contracts mentioned in the bill of complaint. It matters not that the act of assembly does not declare the contracts to be void. The general rule is that a contract made in violation of a statute is void, and when a plaintiff cannot establish a cause of action without relying upon an illegal contract he cannot recover."

See also *Utley* vs. *Clark,* 4 Colo., 369, on the same statute.

A like provision in the law of Utah received the same interpretation at the hands of the Supreme Court of that State in

Booth vs. *Weigand,* 79 Pac., 570.

A Montana statute of like import received the same construction at the hand of Judge Hunt speaking for the Supreme Court of that State in

Kent vs. *Tuttle,* 50 Pac., 559.

The Constitutional provision in Alabama hereinbefore referred to received the same intepretation by the Supreme Court of that State in

Farrior vs. *New England, etc.,* 7 So., 200;

Hanchey vs. *Southern, etc.,* 37 So., 272.

The same provision received a like construction in

Denson vs. *Chattanooga,* 107 Fed., 777;

Denson vs. *Chattanooga* 189, U. S., 408.

To the same effect are:

Central Mfg. Co. vs. *Briggs,* 106 Ill. App., 417;

Farmers, etc. Ins. Co. vs. *Harrah,* 47 Ind., 236;

Sherman Nursery Co. vs. *Aughenbaugh,* 93 Minn., 201, 100 N. W., 1101;

Heilman etc. vs. *Peimeisl,* 85 Minn., 121, 88 N. W., 441;

Delaware etc. vs. Bethlehem, 204 Pa. St., 22, 53 Atl., 533;

Williams vs. *Scullin,* 59 Mo. App., 30;

Parke vs. *Mullet,* 149 S. W., 461 (Mo.);

Harris vs. *Columbia, etc.,* 108 Tenn., 245, 67 S. W., 811;

Huffman vs. *Western Mortgage Co.,* 13 Tex. Civ. App., 169, 36 S. W., 306;

Ashland Lumber Co. vs. *Detroit Salt Co.,* 114 Wis., 66, 89 N. W., 904.

As before stated, the great—we might say overwhelming—weight of authority is to the effect that the Appellees are not estopped from raising this question. Were it otherwise, the Courts would, in the language quoted in the opening paragraph of this brief, "Become auxillary to the consummation of violations of law" and thus "a handmaid of iniquity".

Counsel will try to avoid this question by claiming that Blochman is "a mortgagee in possession", which is not the fact yet; *even were that so the instrument they call a mortgage would be void* and under such circumstances a mortgagee is not so estopped.

Powell vs. *Patison,* 100 Cal., 236.

Wherein Mr. Justice Fritzgerald, speaking for the Supreme Court, disposes of their suggestion in these brief words:

> "It follows that as the mortgage herein was void in its inception the defendant *is not estopped from denying its validity* as would be the case if the mortgage itself were a valid instrument."

See also *Visalia, etc.* vs. *Sims,* 104 Cal., 332 (*supra*).

But the instrument herein is not a mortgage, it is in legal effect a contract on the part of Blochman to buy and of the Appellant to sell a tract of land upon certain terms and conditions. *The title being placed in a void trust to hold and convey but not to be conveyed to the purchaser until all the conditions of the void trust were performed.*

The trust as between the Complainant and Blochman was void.

Sec. 857, Civil Code;

McCurdy vs. *Otto,* 140 Cal., 48.

It conveyed no title to Blochman, legal or equitable, *therefore the title either remained in the grantor or passed to the Trust Company as agent of the grantor,* in either event the transaction was an *executory contract for the purchase and sale of land secured by an equitable lien on the land having the similitude of a mortgage.*

Sessner vs. *Palmateer,* 89 Cal., 92;

Sparks vs. *Hess,* 15 Cal., 186;

Pomeroy's Equity (Third Ed.), Sec. 372, 368 and 105.

Being an executory contract in default, what are the vendor's rights?

First, to stand upon the terms of his contract and sue *at law* for its breach under section 3307 of the Civil Code.

Second, still resting upon the contract, he may remain inactive and retain the property and all moneys paid as liquidated damages.

Third, go into equity, still upon his contract and seek specific performance.

Fourth, rescind and restore.

Fifth, go into a court of equity and compel the vendee to show why his rights should not be forfeited, viz:— foreclose the vendee's right to purchase.

These cover all the vendor's rights and remedies:

Glock v., *Howard,* 123 Cal., 1-10;

Keller vs. *Lewis,* 53 Cal., 118;
Fairchild vs. *Mullan,* 90 Cal., 190.

And all of these remedies *are based upon the contract* of purchase and not upon an equitable mortgage or a legal mortgage; but under the rule laid down in *Powell* vs. *Patison, supra,* even though it were a mortgage the Appellees are not estopped, because the entire transaction whatever its character may be held to be, was void in its inception, and should not have been sustained by the trial court and the decree as rendered should not be disturbed by this court.

A DISCUSSION OF THE EQUITIES OF APPELLANT'S POSITION AND ITS EFFECT UPON THIS APPEAL.

The trust agreement between the Appellant and Appellee, Blochman, provided:

"And the said payee does hereby authorize and direct the said trustee to execute deeds on any lot, or lots, to the order of the beneficiary herein, or his assigns *whenever* there shall have been paid to said trustee for the account of said payee the sum per lot as hereinbefore stated" ($1000.00 for inside lots and $1200.00 for corner lots). (Tr., page 39.)

This is an independent clause in the contract and does not appear to be dependent upon any happening, condition or circumstance other than the payment of the money, and appears to have been placed therein for the express purpose of enabling the payor to dispose of portions of the property from time to time conditioned only upon the condition precedent that the payee received a specified sum per lot for such release or conveyance. No other reasonable construction can be placed upon it.

The trust agreement, however, was not a matter of public record but a private understanding and instruction between the payor and the payee and their agent, the trust company. So far as the public were concerned, the legal title to the property in controversy insofar as the payee had the legal power to convey it had been by it conveyed to and placed of record in the name of the Union Trust Company, the trustee. The deed to them was recorded in the office of the County Recorder of San Diego County (Tr., page 309). The trust agreement never was recorded or made public in any manner, but remained a secret record in the archives of the trust company. So far as the claimants of the thirty lots are concerned, they were dealing with the apparent record owner of the fee title to the premises and had no *constructive notice* of any limitation whatever on the right and power of the holder of the fee to convey it, even though as between the parties such a limitation did exist and the record does not show, or purport to show, that any *actual notice* was ever given to any of said claimants. They, each and all, appear to have been *bona fide* purchasers or mortgagees for value, i. e. $1000.00 per lot for each of the thirty lots, which money was by them paid to the trustee for the payee and in turn paid it to the payee, *who now retains it and makes no offer whatever to refund.* Appellant blandly asks this court sitting as a court of equity to give it back the thirty lots for which appellees have paid it $30,000.00 and to let it keep the money as well as the lots. A proposition which needs but be stated to show its fallacy. Conceding for a moment that appellant's agent and trustee did exceed

its power and authority and did accept money and release lots after the contract was in default, upon what principle or rule of equity can the appellant now take advantage of the mistake or wrong of its own agent and entitle it to keep both the lots and the money? That is precisely the purpose of this appeal, and none other. Their claim is not equitable and is completely met by Section 3521 of the Civil Code of this State, which provides that "he who takes the benefit must bear the burden". Citation of authority upon this principle is unnecessary, being the very basis upon which the law of equity is founded.

CONCLUSION.

Confident that we have shown that appellant has no standing in this court to maintain this appeal for the reason that it has been "doing business" in the State of California in violation of law and that one of its acts in "doing such business" is the contract involved herein which is malum prohibitum, and having further shown that under such circumstances the appellant should not be allowed to recover on such a tainted obligation, but must be left in the situation in which it has placed itself by its wrong doing, and having further shown that there is no equity whatever in the position that it has herein taken, we respectfully submit that no relief should be granted to it by the Court herein, but that the decree of the trial court should be affirmed.

Sam Ferry Smith,

Lawrence Hammond Smith,

Solicitors for L. A. Blochman.